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In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN HEMPHILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The district court did not issue an opinion. The opinion of the court of appeals (Pet. App. C, pp. 5a-10a) is reported at 544 F. 2d 341.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1976, and a petition for rehearing was denied on December 28, 1976. The petition for a writ of certiorari was filed on February 2, 1977, and therefore is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 7215 and 7512 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at Pet. App. A, pp. 1a-2a.

QUESTION PRESENTED

Whether the court of appeals correctly reinstated a jury verdict convicting petitioner of failure to deposit withheld taxes.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of failure to deposit income and Federal Insurance Contributions Act taxes withheld from wages of employees of Hemphill Contracting Co., Inc., in violation of 26 U.S.C. 7215 and 7512. Each of the 12 counts alleged a separate violation with respect to a weekly payroll during the period from May 9, 1975, to July 25, 1975 (Pet. App. C, pp. 5a-6a).

The pertinent facts are as follows: During 1974 and 1975 petitioner was president of Hemphill Contracting Co., Inc., and was primarily responsible for the management of that corporation's business (Tr. 12).[1] On May 1, 1975, an Internal Revenue Service officer personally served on petitioner a written notice under Section 7512 that Hemphill Contracting Co. was required to deposit income and FICA taxes thereafter withheld from the wages of its employees in a separate bank account designated as a special fund in trust for the United States, not later than the second banking day after its payment of the wages (Tr. 57-61). Hemphill made no deposits of the taxes withheld from wages paid to its employees on the 12 weekly paydays between May 9, 1975, and July 25, 1975 (Tr. 63-64, 66). Although Hemphill reported that taxes of approximately $11,000 were withheld for that period, they remained unpaid at the time of trial (Tr. 32-36).

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[1]"Tr." refers to the trial transcript.

At the time petitioner received the notice under Section 7512, the records of the Internal Revenue Service reflected the fact that Hemphill Contracting Co. had not paid over the withholding taxes for the fourth quarter of 1974 and the first quarter of 1975 (Tr. 28-30). Moreover, during the four quarters of 1974 (except on two occasions) and the first quarter of 1975, Hemphill had not deposited withholding taxes, as required by Section 6302 of the Code and Treasury Regulations on Employment Tax, Section 31.6302(c)-1 (26 C.F.R.) (Tr. 24-30, 51-52).

Between November 5, 1974, and April 22, 1975, petitioner had delivered to the revenue officer five checks in a total amount of $57,152.44, which were applied to his personal liability for the failure in 1973 (and earlier) of another corporation, Hempbrook Construction Co., Inc., to pay over taxes withheld from wages of its employees (Tr. 14-16).[2] The revenue officer testified that the checks were so applied at the direction of petitioner (Tr. 71-75). Petitioner testified that his understanding with the revenue officer was that the checks would be used to cover any current liability

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[2]The dates and amounts of the checks were: November 5, 1974, $10,027; December 23, 1974, $15,000; January 27, 1975, $5,000; March 8, 1975, $5,000; April 22, 1975, $22,125.44. The first check was a cashier's check purchased by a check drawn on an account of Hemphill Contracting Company; the other four checks were checks drawn on an account of Hemphill Contracting Co. (Tr. 14-16).

Petitioner owned a 37 percent interest in Hempbrook Construction Co. and was the vice-preseident of that corporation (Tr. 141). Hempbrook's withholding taxes had been written off as uncollectible and personal assessments had been made against its responsible officers, including petitioner (Tr. 73, 86). Petitioner signed an agreement, pursuant to which he agreed to pay these taxes and interest (Tr. 176-178). The agreement provided that $10,027 would be paid on November 6, 1974, and that $15,000 would be paid on the 20th of each month thereafter until the assessment was paid in full (Tr. 177).

of Hemphill Contracting Co., with any remaining balance credited to his personal liability for Hempbrook taxes (Tr. 144-145, 163).

The case was submitted to the jury on instructions to which neither side objected, and the jury found petitioner guilty on all 12 counts. However, the district court granted petitioner's motion for a judgment of acquittal notwithstanding the verdict (Pet. App. C, p. 6a). In the district court's view, the conviction could not stand because the Internal Revenue Service "took money from [petitioner], from the Hemphill Construction Co., and if he had been credited for that, which he should have been, * * * he would not have had any liability * * *" (Pet. App. D, p. 14a).

The court of appeals unanimously reversed, directing that the verdict be reinstated and that sentence be imposed (Pet. App. C, pp. 5a-10a). It found that "the case was a sharply contested one, and under the instructions of the district court the jury might well have acquitted * * * [petitioner]" (Pet. App. C, p. 8a). However, it concluded that the case turned on the conflict in the testimony of petitioner and the revenue officer as to the application of the payments and that the jury was entitled to reject petitioner's defense (Pet. App. C, pp. 8a-9a).

ARGUMENT

1. The court of appeals correctly reinstated petitioner's conviction for failure to deposit taxes withheld from the wages of Hemphill Contracting Co. in a separate bank account designated as a trust fund for the United States, in violation of the requirements of 26 U.S.C. 7512(b). After a "sharply contested" trial (Pet. App. C, p. 6a), the jury rejected petitioner's defense that the revenue officer misapplied the payments from five checks tendered by petitioner between November 5, 1974, and April 22, 1975. There

was conflicting testimony concerning the liability to which the five checks were to be applied, but the jury chose to believe the revenue officer's testimony that petitioner had directed that the checks be applied to his personal liability for the unpaid withholding taxes of Hempbrook Construction Co., and not to believe petitioner's testimony that the payments were intended to cover taxes currently withheld from the employees of Hemphill Contracting Co.

The jury was entitled to make that choice. Contrary to petitioner's argument (Pet. 7-12), raised for the first time in a petition for rehearing in the court of appeals, the revenue officer's testimony was competent and admissible and did not require corroboration in writing by petitioner. Treasury Regulations on Procedure and Administration, Section 301.6311-1(a) (1)(iii) (26 C.F.R.), upon which petitioner relies (Pet. 10), is not applicable to this case. By its terms, the Regulations require a letter of transmittal from the taxpayer only if a single payment is to be allocated between two or more accounts. Thus a letter of transmittal would have been required only if petitioner had directed that the checks were to be applied both to his personal liability as a responsible officer of Hempbrook Construction Co. and to that of Hemphill Contracting Co. Indeed, the absence of such a letter corroborates the revenue officer's testimony that petitioner had instructed him to apply the checks only to petitioner's personal liability.

2. Petitioner further argues (Pet. 12-17) that the government should be required to prove some degree of intent to obtain a conviction for failure to deposit withholding taxes. But petitioner acknowledges (Pet. 13) that Congress intentionally omitted from Section 7215(a) any requirement of proof that a defendant acted willfully in failing to comply with Section 7512(b). S. Rep. No. 1182, 85th Cong., 2d Sess. 2, 5 (1958); *United States* v. *Paulton*, 540 F. 2d 886 (C.A. 8);

United States v. *Dreske*, 536 F. 2d 188 (C.A. 7); *United States* v. *Gorden*, 495 F. 2d 308 (C.A. 7). Here, however, the district court instructed the jury that "in order to find this defendant guilty, you must not only believe that he did the acts complained of of which he stands charged, but you must also believe that the acts were intentionally and knowingly done by the defendant" (Tr. 238). The court of appeals correctly characterized the instructions as "perhaps more favorable to * * * [petitioner] than he had a right to expect * * *" (Pet. App. C, p. 7a). Since the jury had to have found, under these instructions, that petitioner had acted willfully in failing to comply with Section 7512(b), there accordingly is no occasion for a determination in this case as to whether the government should be required to prove some degree of intent in order to sustain a conviction under Section 7215(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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